

**NAPM**



**NATIONAL ASSOCIATION OF PHARMACEUTICAL MANUFACTURERS**

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June 2, 2000

Dockets Management Branch (HFA-305)  
Food and Drug Administration  
5630 Fishers Lane  
Room 1061  
Rockville, MD 20852

Re: Report to Congress on Pediatric Exclusivity; Request for Comments  
(Docket No. 00N-1266)

Dear Food and Drug Administration:

The National Association of Pharmaceutical Manufacturers (NAPM) submits this comment in response to the Food and Drug Administration's (FDA) publication in the May 5, 2000 Federal Register of the "Report to Congress on Pediatric Exclusivity; Request for Comments." NAPM is a national, not-for-profit trade association representing manufacturers and distributors of generic drugs, as well as suppliers of bulk pharmaceutical chemicals and other goods and services to the U.S. generic drug industry.

On November 21, 1997, the Food and Drug Administration Modernization Act of 1997 (FDAMA) was signed into law and included a provision relating to pediatric studies of drugs. This provision, Section 505A of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 355a, was designed to address an important problem -- insufficient clinical studies and information relating to the safety and appropriate dosage levels of medications for pediatric populations. At the time Congress considered Section 505A, it was estimated that (1) only a small fraction of all drugs marketed in the United States had received FDA approval for use in at least one pediatric age group, and (2) a majority of marketed drugs were not labeled for use in pediatric patients or for use in specific pediatric age groups. 62 Fed. Reg. 43,900 (1997). For example, less than half of the drugs approved for treatment of human immunodeficiency virus (HIV) infection or accompanying opportunistic infections carried any pediatric safety or effectiveness information, and, of those that did, the data was often incomplete and limited to certain pediatric age groups. Id. For most drug classes, there was almost no information on use in patients under two years of age. Id.

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Congress sought to address this important problem in FDAMA by providing brand name drug manufacturers with incentives to develop scientific and medical information on the possible health benefits of using those drugs in children. Under new 505A, if an eligible brand name drug manufacturer responds to an FDA request for such studies, the manufacturer may receive a six-month extension of time during which generic drug manufacturers are barred from bringing their competing drugs to the market.

NAPM strongly supports the underlying objectives of Section 505A -- ensuring the safety of drugs used in pediatric populations and appropriate labeling of those drugs. NAPM is concerned, however, that FDA's implementation of these important provisions has hindered rather than furthered the goals of the FFDCA generally, and Section 505A in particular.

**I. FDA'S IMPLEMENTATION OF THE PEDIATRIC EXCLUSIVITY PROGRAM HAS BEEN INEFFECTIVE IN IMPROVING INFORMATION ABOUT IMPORTANT PEDIATRIC USES FOR APPROVED DRUGS**

FDA sought comment on the pediatric exclusivity program's effectiveness in improving information about important pediatric uses for approved drugs.

NAPM believes that FDA is implementing the pediatric exclusivity program in a manner that is overwhelmingly pro-brand name drug industry and pro-exclusivity at the cost of competition for the consumer. In compiling its list of drugs for which pediatric studies could be conducted in exchange for exclusivity, "List of Approved Drugs For Which Additional Pediatric Information May Produce Health Benefits In Pediatric Populations" (Pediatric Drug List), FDA included almost every drug possible. FDA's Pediatric Drug List specifically includes many over-the-counter (OTC) drug products and prescription drugs that are not intended to treat serious or life-threatening diseases or conditions that occur in pediatric populations.

As a result, FDA's implementation of the pediatric exclusivity program is at odds with both the statutory scheme of the FFDCA and the legislative history of FDAMA. First, it runs counter to the FFDCA's statutory scheme because it prevents, rather than encourages, the introduction of more generic drugs to the market. Second, it departs from FDAMA's legislative history by extending market monopoly to certain drugs when Congress clearly intended otherwise. Third, it may not adequately address Congress' intent that prescription drugs be adequately labeled for use in pediatric populations.

**A. FDA's Implementation Of The Pediatric Exclusivity Program Runs Counter To The FFDCA's Statutory Scheme By Preventing, Rather Than Encouraging, The Introduction Of More Generic Drugs To The Market.**

In 1984, the Drug Price Competition and Patent Term Restoration Act, popularly known as the "Hatch-Waxman Amendments," was signed into law. The Hatch-Waxman Amendments struck a balance between establishing an approval mechanism for generic drug products, so that those products could enter the market in a timely fashion, and providing brand name drug companies with an appropriate return on their investment through non-patent market exclusivity and increased patent terms.

The Hatch-Waxman Amendments were the foundation on which Congress later enacted Section 505A. Congress added this section for a specific, well-defined purpose. It offered the opportunity for brand name drug manufacturers to receive an additional six-month period of market monopoly, or in some cases two six-month periods, in exchange for submitting studies on the use of their drugs by children. The legislative history leading to enactment of this provision shows that Congress was focused on prescription drugs and especially those drugs that are indicated for serious or life-threatening diseases or conditions. Because the provision was targeted at a specific class of drugs, it was consistent with the overall regulatory framework which the Hatch-Waxman Amendments had established to speed the availability of generic drugs.<sup>1</sup>

FDA's implementation of Section 505A, however, is doing precisely the opposite. Under FDA's approach, a wide indiscriminate class of brand name drugs, including OTC drug products and prescription drugs that are not intended to treat serious or life-threatening diseases or conditions in children, are eligible for additional monopoly periods. This erroneous interpretation of Section 505A already has kept generic versions of those drugs from quickly reaching the market. As a result, it is incompatible with the FFDCA statutory scheme, which, among other things, aims to accelerate the availability of generic drugs.

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<sup>1</sup> The six-month non-patent exclusivity provision is discussed further in Section II of these comments.

**B. FDA's Implementation Of The Pediatric Exclusivity Program Departs From The Legislative History Of Section 505A By Extending Market Monopoly To Certain Drugs When Congress Clearly Intended Otherwise.**

FDA's broad interpretation of Section 505A is not supported by the legislative history. First, the legislative history of FDAMA clearly shows that Congress intended Section 505A to apply to prescription drugs only. In its Report on FDAMA, the Senate Labor and Human Resources Committee referred specifically to prescription drugs and to pediatricians who would be prescribing them:

Currently, less than 20% of the prescription medications on the United States market are approved for use in the pediatric population and labeled for pediatric use. Pediatricians using drugs developed with adults in mind but which may also be effective or be the only option for treating the same illnesses and diseases in children must estimate dosages from dosages found to be safe and effective in adults.

S. Rep. No. 105-43 at 51 (1997) (emphasis added). Moreover, the sponsors of the Better Pharmaceuticals for Children Act, legislation that evolved into the pediatric studies of drugs provision of FDAMA, repeatedly linked the legislation to the need for more information on prescription drugs. 143 Cong. Rec. S4276-4277, 4281-4282 (daily ed. May 9, 1997); and 143 Cong. Rec. E1093 (daily ed. June 3, 1997).

Second, the legislative history makes clear that Congress intended Section 505A to apply to drugs used to treat serious or life-threatening diseases or conditions. Throughout Congress' consideration of both the Better Pharmaceuticals for Children Act and FDAMA, the principal proponents of the legislation (i.e., the American Academy of Pediatrics and the Pediatric AIDS Foundation) strongly advocated the need for scientific research to provide drug label information for infants and children who are suffering from serious or life threatening diseases or conditions. Among the serious or life-threatening diseases or conditions frequently mentioned were AIDS, cardiovascular ailments, liver disease, and cancer.

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Floor statements by sponsors of the Better Pharmaceuticals for Children Act reflect their intent to limit the legislation to drug products for serious or life-threatening diseases or conditions. For example, Senator Mike DeWine discussed anesthetics, asthma, and life-threatening infections. 143 Cong. Rec. S4281-4282 (daily ed. May 9, 1997). Likewise, Senator Christopher Dodd discussed, among other things, sedatives, AIDS, and asthma. 143 Cong. Rec. S4276-4277 (daily ed. May 9, 1997).

NAPM is unaware of any legislative history suggesting Congress intended the legislation to go beyond prescription drugs. Moreover, the legislative history indicates that Congress did not intend the six months of pediatric market monopoly to apply to drug products which are not used to treat a serious or life-threatening disease or condition.

Despite strong legislative history to the contrary, one of the first drugs to receive exclusivity under the new Section 505A was ibuprofen suspension drops for young children. This OTC medication has been available and marketed for young children for a number of years. By including OTC drug products, like ibuprofen, and drugs that clearly do not fall within the category of treating serious or life-threatening diseases or conditions, FDA has trivialized Section 505A.

**C. FDA's Implementation Of The Pediatric Exclusivity Program May Not Adequately Address Congress' Intent That Prescription Drugs Be Labeled For Use In Pediatric Populations.**

As previously mentioned, one of the main purposes for Section 505A was to ensure that prescription drugs used in pediatric populations are properly labeled with dosing and other relevant information for those populations. Congress sought to provide physicians with the information they needed to treat sick children. Senator DeWine characterized prescribing drugs for which no information regarding their use in children was available as a "gamble" and a game of "Russian Roulette." 143 Cong. Rec. S4281-4282 (daily ed. May 9, 1997).

Since Section 505A was enacted, FDA has requested that brand name drug manufacturers conduct pediatric studies on a significant number of drugs. It is unclear, however, how many of those studies have translated into labeling changes regarding the appropriate use of the drug in pediatric populations. NAPM believes that the most effective test for determining whether FDA's pediatric exclusivity program has been a success would be to assess how many labeling supplemental applications have been submitted, and how many have been approved, based on pediatric studies that led to six-month exclusivity. FDA should provide this information in its report to Congress, so that Congress and the public can assess whether pediatric exclusivity is advancing the goals that Congress intended.

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## **II. THE SIX-MONTH NON-PATENT EXCLUSIVITY INCENTIVE IS MORE THAN ADEQUATE**

FDA sought comment on the adequacy of the pediatric exclusivity incentive.

Before FDAMA was enacted, FDA had the regulatory authority to require a brand name drug company to perform needed pediatric studies. In fact, FDA exercised its authority in August 1997, by proposing a rule to require brand name drug manufacturers to perform such studies. 62 Fed. Reg. 43,900 (1997). Congress was unwilling to wait for FDA to complete its rulemaking and, therefore, included new FFDCA Section 505A in FDAMA, which provided an additional six months of market exclusivity for brand name drug manufacturers that perform pediatric studies. 143 Cong. Rec. S4282 (daily ed. May 9, 1997). NAPM believes that it is unnecessary to provide brand name drug companies with additional incentives for performing pediatric studies. Since FDAMA was enacted, brand name drug companies have pursued pediatric studies for virtually every drug they develop.

Moreover, any additional incentive would have a significant impact on prescription drug prices. In 1997, the Congressional Budget Office estimated that it would cost the federal government \$126 million over the 1998-2002 period to provide brand name drug companies with an additional six months of market exclusivity. Congressional Budget Office Cost Estimate of H.R. 1411, Prescription Drug User Fee Reauthorization and Drug Regulatory Modernization Act of 1997 (October 1, 1997). Of course, this \$126 million price tag does not include the costs to American consumers, state governments, or third-party payors due to the delayed availability of generic drugs.

NAPM believes that the six-month market exclusivity incentive is more than adequate for prescription drugs used to treat serious or life-threatening diseases or conditions. For the reasons set forth in Section I, NAPM believes six-month market exclusivity should be eliminated for OTC drugs and prescription drugs that are not intended to be used to treat serious and life-threatening diseases or conditions. Since FDAMA was enacted, brand name drug manufacturers have aggressively pursued these studies which result in six months of additional market exclusivity. Any additional incentive would only hurt American consumers, who are currently paying more for their drugs because of a six-month delay in generic drug competition.

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### III. SUGGESTED MODIFICATIONS

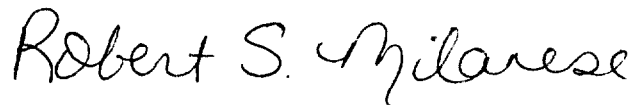
FDA sought comment on suggested modifications.

Globally, NAPM suggests that FDA implement FDCA Section 505A as Congress intended. Section 505A should only apply to prescription drugs used to treat serious and life-threatening diseases or conditions that lack adequate labeling for use in infants and children. In particular, as we expressed in our October 26, 1999 citizen petition (Docket No. 99-P4618), NAPM does not believe that FDA's pediatric exclusivity program should have any effect on the review and approval of abbreviated new drug application (ANDA) suitability petitions. NAPM urges FDA to maintain its long-standing position and continue to approve ANDA suitability petitions, without regard for whether a pediatric study may be required under 21 C.F.R. § 201.23, "Required Pediatric Studies."

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The members of NAPM thank the agency for its consideration of this comment.

Sincerely,

A handwritten signature in cursive script that reads "Robert S. Milanese".

Robert S. Milanese  
President